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APR 13 1960
JAMES R. BROWNING, Clerk

No. 741 and No. 812, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated February 17, 1959 (Pet. App. A), is reported at 170 F. Supp. 562. The opinion of the District Court, dated June 18, 1959 (R. 2), is reported at 175 F. Supp. 873. The opinions of the United States Court of Appeals for the Second Circuit of November 2, 1959 (Pet. App. C–1), December 2, 1959 (Pet. App. C–20), January 29, 1960 (Pet. App. B), and March 23, 1960 (Petitioner's Motion for Leave to File Supplementary Appendix in No. 742, No. 813, Misc., App. F) are all as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1960. The petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus or other appropriate writ were filed on February 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 1651(a).

QUESTION PRESENTED

The Government appealed to the Court of Appeals from a single-judge District Court's dismissal of its complaint. The Court of Appeals reversed on the merits and directed the entry of judgment for the Government. Petitioners moved for a rehearing before the Court of Appeals, challenging the decision on the merits. After this petition was denied, petitioners then for the first time raised the issue that only this Court, and not the Court of Appeals, had jurisdiction of the appeal. The Court of Appeals, while recognizing that the question of its appellate jurisdiction was close, ruled that the Government's appeal should have been taken directly to this Court.

The single question presented by petitioners is whether, under the foregoing circumstances, the Court of Appeals, in order to preserve the Government's right to appeal, properly vacated the District Court judgment and ordered it to enter a new decree from which the Government could appeal directly to this Court.

STATUTES INVOLVED

28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

This suit (the "Government's suit") was instituted in the District Court for the Southern District of New York under Section 12(1) of the Interstate Commerce Act, as amended, 49 U.S.C. 12(1), by the United States, on behalf of the Interstate Commerce Commission, against the New York, New Haven, and Hartford Railroad ("New Haven") and petitioners (the "banking group"). The relief sought was twofold: (1) a declaratory judgment that a contract between New Haven and the banking group in which New Haven made a contingent commitment to repurchase 131,385 shares of its preferred stock from the banking group is unlawful and void because of lack of compliance with Section 20a of the Interstate

Commerce Act, as amended, 49 U.S.C. 20a;[1] and (2) an injunction restraining the New Haven from carrying out this agreement (R. 9a).

Prior to that time, a group of New Haven stockholders had brought suit in the Southern District against the New Haven, its directors, one of the members of the banking group, *et al.* Their complaint was in multiple counts and concerned many transactions. The sixth count set forth the same contract between New Haven and petitioners involved in the Government's suit, and claimed, as did the Government, that the transaction was void for lack of approval of the ICC under Section 20a. The prayer for relief asked, *inter alia,* that the defendants be enjoined from performing the contract.

The District Court simultaneously dismissed the Government's suit and the sixth count of the stockholders' suit, holding that the challenged contract did not require ICC authorization under Section 20a. 170 F. Supp. 562 (Pet. App. A); 175 F. Supp. 873. The Government and the stockholders both appealed to the Court of Appeals for the Second Circuit.

On November 2, 1959, the Court of Appeals, in a comprehensive and well-reasoned opinion, reversed the District Court and ruled that Section 20a required submission of the agreement to the ICC (Pet. App. C–1). The Court of Appeals did not, at that time, pass on the stockholders' appeal, which on the merits

[1] Section 20a invalidates securities issued by a carrier without prior approval by the Interstate Commerce Commission. The Government's basic position on the merits in this litigation has been that the repurchase agreement constituted an issuance or modification of securities subject to Section 20a; and that it was therefore illegal because it had not been approved by the Commission.

involved an identical issue of law, because it then had pending before it a motion to dismiss that appeal for lack of jurisdiction on the ground that no final or appealable judgment had as yet been entered in the stockholders' action.

On December 2, the banking group's petition for rehearing in the Government's suit was denied (Pet. App. C–20). On December 15, their motion for stay of mandate was also denied by the Court of Appeals. Two days later, on December 17, counsel for the banking group, for the first time in the case, suggested to the Court of Appeals that the Government's appeal had been improperly taken to that court. They maintained that under Section 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 49 U.S.C. 45, the appeal from the District Court's decision in the Government's suit should have been taken directly to this Court, and that the sixty day period for taking such a direct appeal had already expired.[2]

After receiving briefs, the Court of Appeals, in its opinion of January 29, 1960 (Pet. App. B), (1) held that it had lacked jurisdiction to hear the Government's appeal because the Expediting Act applied to actions brought to enforce Section 20a of the Interstate Commerce Act, (2) vacated its judgment of November 2, 1959, reversing the District Court's decision in the Government's suit, (3) ordered the District Court to vacate its judgment and to enter a new decree from which the Government would have sixty days within which to take a direct appeal to

[2] Final judgment of the District Court in the Government's suit had been entered on July 10, 1959 (R. 110a).

this Court,[3] (4) denied the pending motion to dismiss the stockholders' appeal, holding that it had jurisdiction of the stockholders' appeal under 28 U.S.C. 1292(a)(1), (5) "for the reasons fully set forth" in its November 2, 1959, opinion in the Government's suit, reversed the judgment of the District Court dismissing the sixth count of the stockholders' complaint, and (6) directed the issuance of an injunction in the stockholders' suit, against performance of the contract.

On February 29, 1960, the banking group filed petitions for writs of certiorari and mandamus in both the Government's and the stockholders' suit. In this, the Government's suit, they seek review of the Court of Appeals' decision that, notwithstanding its view that it lacked jurisdiction over the Government's appeal, it had power to order the District Court to enter a fresh decree from which the Government could appeal to this Court. In the stockholders' suit, they seek review of the Court of Appeals' decision that it had jurisdiction of the stockholders' appeal under 28 U.S.C. 1292(a)(1),[4] and that ICC approval of the

[3] As already noted, the Government's time to appeal directly to this Court from the decision of the District Court, which was appealed to the Court of Appeals, had expired. The Court of Appeals indicated that because of the bankers' delay in raising the jurisdictional objection it would not have vacated its earlier judgment of November 2, 1959, had it not been empowered to order the District Court to enter a fresh decree, thus allowing the Government an opportunity to secure review of the District Court's decision in this Court (Pet. App. B–15).

[4] Subsequent to the filing of the petitions for certiorari, the Court of Appeals, on March 23, 1960, denied Judge Clark's request for a rehearing *en banc* on the question of the Court of Appeals' jurisdiction over the stockholders' appeal pursuant to 28 U.S.C. 1292(a)(1) (Petitioner's Motion for Leave to File

agreement was required by Section 20a.[5] No. 742, No. 813, Misc., October Term, 1959.[6]

The United States will file shortly a conditional cross-petition in the instant case that will request the Court, if it should grant the instant petition, also to review the ruling below that the Expediting Act applies to suits to enforce Section 20a of the Interstate Commerce Act.

ARGUMENT

The propriety of a direction by an appellate court to a district court to vacate its judgment in circumstances similar to those involved here is fully established by the decisions of this Court. The decision of the Court of Appeals is therefore clearly correct and, since the alleged conflict with *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), is non-existent, further review by this Court is not warranted.

1. As the Court of Appeals noted (Pet. App. B–13), a "long line of decisions" of this Court establish the power of an appellate court, in a case where it does not have appellate jurisdiction, to vacate the judgment appealed from and to direct entry of a fresh judgment, in order to allow the appellant to take a new appeal to the proper court. *E.g.*, *Query* v. *United States*, 316 U.S. 486, 490; *Wilentz* v. *Sovereign Camp*,

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Supplementary Appendix in No. 742, No. 813, Misc., App. E). In his dissenting opinion on that ruling Judge Clark indicated his agreement with that part of the Court of Appeals' decision in the Government's suit of which petitioner here complains (*id.* at 1115, note 9).

[5] The Government is filing a memorandum *amicus curiae* in the stockholders' suit.

[6] On March 2, 1960, Mr. Justice Harlan denied petitioners' application for a stay of the Court of Appeals' mandate in the Government's suit.

306 U.S. 573, 582; *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16, 18–19. Although petitioners attempt to distinguish these cases on the ground that they related "exclusively * * * to appeals from improperly convened three-judge district courts" (Pet. 7)—a factor which we do not think undermines their authority for the ruling below—they do not discuss another decision cited by the Court of Appeals (*Columbia Gas and Electric Corp.* v. *American Fuel and Power Co.*, 322 U.S. 379) which involved an appeal from a one-judge district court. As the Court of Appeals correctly pointed out (Pet. App. B–16), that decision fully sustains its "power thus to vacate the judgment below where the sole defect is lack of appellate jurisdiction."

In *Columbia Gas*, a direct appeal was taken under the Expediting Act to this Court from a judgment of a single-judge district court, entered in bankruptcy proceedings in which the United States had intervened. This Court held (322 U.S. at p. 384) that it had no "jurisdiction * * * to entertain" the appeal, since the bankruptcy proceeding was not a "suit in equity" "brought" in a district court "wherein the United States is complainant" (*id.* at 383) within the meaning of Section 2 of the Expediting Act. Accordingly, it dismissed the appeal. However, it specifically stated (*id.* at 384):

> Since appellant has also taken an appeal to the Circuit Court of Appeals, we need not exercise our supervisory power to vacate the judgment below, in order to permit a proper appeal to be taken. [Citing cases.]

Although not mentioned by the Court of Appeals, *United States* v. *Belt*, 319 U.S. 521, equally supports the ruling below. In that case, a suit brought by the United States to clear title to certain real property had been decided against the Government by a one-judge district court. The judgment of the district court, whose jurisdiction was undisputed, was appealed directly to this Court. This Court held that it was without jurisdiction to hear the Government's appeal because the statute which had formerly permitted such direct appeals had been repealed by the Judiciary Act of 1925. It nevertheless ordered that "the judgment appealed from [be] vacated and the cause * * * remanded to the District Court so that it may enter a new judgment from which the United States may, if it wishes, perfect a timely appeal to the Court of Appeals" (319 U.S. at 523). See also *Goldlawr, Inc.* v. *Heiman*, 273 F. 2d 729 (C.A. 2).

The rationale of these decisions—that where a timely appeal is taken to the wrong court, the appellate court has the power to, and in appropriate circumstances should, vacate the judgment and direct entry of a new judgment, to permit an appeal to the right court—is equally applicable to the case at bar. Indeed, this is a particularly appropriate case for invocation of the principle since, as the Court of Appeals recognized (Pet. App. B–16, B–14), the jurisdictional issue here "had not been fully settled" and the Government's arguments that appeal was properly taken to that court were "substantial."

Petitioners contend (Pet. 7), however, that the Court of Appeals had to have actual or ultimate jurisdiction

to hear the merits of the appeal in order to vacate the judgment of the district court. They rely on 28 U.S.C. 2106, which empowers the courts of appeals to "vacate * * * any judgment of a court lawfully brought before it for review * * *," and 28 U.S.C. 1651(a), which empowers the courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions" (Pet. 8). But these affirmative grants of jurisdiction cannot be read as imposing any such limitation on the appellate courts' settled authority "to vacate the judgment below, in order to permit a proper appeal to be taken" (*Columbia Gas, supra*). The argument is refuted by such cases as *Columbia Gas* and *Belt, supra,* where this Court, although it clearly had no jurisdiction to hear the appeal on the merits, nevertheless emphasized its power to vacate the judgment of the lower court to permit an appeal to the right court and, in the *Belt* case, actually did so.

Furthermore, petitioners ignore the many decisions holding that a court has jurisdiction to direct that a judgment below be vacated and the complaint in the action dismissed, notwithstanding the fact that it presently lacks, and never will have, jurisdiction of the appeal, whether by reason of mootness of the controversy, *United States* v. *Munsingwear,* 340 U.S. 36, 39, or the failure to substitute a successor in office as a party defendant, *Snyder* v. *Buck,* 340 U.S. 15, 22. Accord, *e.g., Defense Supplies Corp.* v. *Lawrence Warehouse Co.,* 336 U.S. 631; *Walling* v. *Reuter,* 321 U.S. 671; *United States ex rel. Claussen* v. *Curran,* 276 U.S. 590; *United States* v. *Hamburg-Ameri-*

kanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466; *In re Cook's Motors*, 142 F. 2d 369 (C.A. 1). Significantly, the order of the Court of Appeals here challenged will have a less drastic effect than the orders approved in those cases. Here the end result is that the District Court will merely re-enter its original decree dismissing the Government's suit so as to permit the United States to appeal directly to this Court,[1] while in those cases a judgment previously entered was finally vacated.

2. Contrary to petitioners' suggestion (Pet. 7), the decision below is not in conflict with *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied *sub nom. Missouri-Kansas Pipe Line Co.* v. *Columbia Gas & Elec. Corp.*, 309 U.S. 687. In *Missouri-Kansas*, the court dismissed, for want of jurisdiction to consider them, appeals from denials by a district court of petitions to intervene in a Government antitrust suit, on the ground that under the Expediting Act such appeals must be taken directly to this Court. But there is nothing in that opinion that states, or even suggests, that the Court of Appeals, if it deemed it appropriate, could not have vacated the District Court judgment and ordered entry of a fresh decree to permit an appeal to this Court.

It is evident that petitioners have been unable to show that there is a substantial question presented in their petition seeking review of the order of the Court of Appeals merely preserving the Government's right to appeal direct to this Court. The judicial authority

[1] On March 25, 1960, the District Court re-entered its original decree.

of a federal appellate court to make such a protective order in the interest of justice has been repeatedly recognized and, indeed, prior to this petition, does not appear to have even been questioned. The inability of the petitioners to show any conflict of decisions in this limited area of appellate review is not surprising because the authority exercised is an inherently essential one for an appellate court in the federal system. The contention of petitioners that the Government should be foreclosed by an adverse decision of the District Court held to be erroneous by a unanimous decision of the Court of Appeals is reminiscent of the formalism of ancient common law pleading.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari and the motion for leave to file a petition for writ of mandamus or other appropriate writ* should be denied.

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APRIL 1960.

*If, as we contend, the criteria for the grant of a writ of certiorari have not been satisfied, it follows *a fortiori* that the criteria for the grant of the motion for leave to file a petition for an extraordinary writ, which are even more demanding, have also not been satisfied.

U.S. GOVERNMENT PRINTING OFFICE 1960